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IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1956

CHARLIE E. MAY,
Petitioner,

vs.

ELLIS TRUCKING COMPANY, INC.,
Respondent.

Petition for Writ of Certiorari to Review the Judgment of the United States Court of Appeals for the Sixth Circuit.

BRIEF

Of Respondent in Opposition to the Petition for Certiorari.

L. E. GWINN,
725 Columbian Mutual Tower,
Memphis, Tennessee,
Attorney for Respondent.

NELSON, NORVELL and FLOYD,
1001 Columbian Mutual Tower,
Memphis, Tennessee,
(Of Counsel).

ST. LOUIS LAW PRINTING CO., 415 North Eighth Street. CEntral 1-4477

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Of Respondent in Opposition to the Petition for Certiorari.

OPINIONS BELOW.

The opinion of the trial court overruling petitioner's motion for a new trial appears at pages 102a-104a of the Appendix in this case.

The order of the court overruling the motion for a new trial and directing a remittitur appears at page 105a of the Appendix and is set out at pages 44 and 45 of the Petition for Writ of Certiorari in this cause.

The Court of Appeals did not render a written opinion in the case but rendered the following judgment, which is set out at page 43 of the Petition for Certiorari, and reads as follows:

> "In a suit for personal injuries arising from an automobile accident, appellant was awarded a jury verdict of $42,500. On motion for a new trial, the district court entered judgment for $25,000 without obtaining the consent of appellant, concluding that in view of the testimony on the extent of injury the 'verdict was so excessive as to shock the conscience of the court.' There is no question under these circumstances that the trial judge had the discretionary power to order a new trial, but the district court committed error by reducing the verdict without giving appellant the option of either accepting a remittitur or of having a new trial. **Kennon v. Gilmer**, 131 U. S. 22, 27-30 (1889); **Dimick v. Schiedt**, 293 U. S. 474, 482-85 (1935).
>
> "Upon remand the district court will have the power either to grant or deny a new trial generally or to deny a new trial on the condition that appellant accept a judgment for a lesser amount than the jury verdict.
>
> "The judgment is set aside and the case is remanded to the district court for reconsideration of the motion for a new trial."

JURISDICTION.

Jurisdiction is apparently invoked by Petitioner under United States Code Title 18, Section 1254 (1) and under the provisions of Supreme Court Rule 19 (1) (b).

Jurisdiction in the trial court was founded upon diversity of citizenship, Petitioner and Respondent being citizens and domiciled in different states and the amount in controversy exceeding, exclusive of interest and costs, the sum of $3,000 (Title 28, U. S. Code, Sec. 1332).

STATEMENT OF THE CASE.

The complaint filed in the United States District Court for the Western District of Tennessee alleged common law and statutory negligence, including a violation of Memphis City Ordinances, and claimed damages in the sum of $75,000 (App. 8a) for personal injuries, and property damages in an additional and separate sum of $3,000 (App. 12a).

Respondent answered, admitting the diversity of citizenship, alleging that Petitioner had a policy of collision insurance and setting out that he collected a claim thereunder of $857.50, and denying all other allegations of the complaint and asking that it be dismissed (App. 13a, 14a).

Petitioner, plaintiff below, thereafter sought and obtained leave to amend the complaint and increased the demand for compensatory damages to $100,000 (App. 15a, 16a, 17a).

After a trial lasting several days the jury returned a verdict in favor of Petitioner and against the Respondent, Ellis Trucking Co., Inc., and assessed personal injury damages in the amount of $42,500 and property damages in the sum of $1,100 (App. 88a).

Respondent duly filed a motion for a new trial and on a consideration thereof the same was overruled except as to grounds III and IV, which read as follows:

> "III. The verdict of the jury is excessive."
>
> "IV. The verdict of the jury is so excessive as to evince passion, prejudice or unaccountable caprice on the part of the jury."

In sustaining these grounds of the motion, the court said:

> "A new trial will not be necessary in this case, but in the court's opinion the jury's appraisal of the damages was so manifestly excessive that the court is

bound in the interest of justice to order that the excessive portion of it be remitted. This was a monstrous verdict. * * * Certainly there was no rational appraisal of the evidence on the question of damages in the light of what would be reasonable for the injury involved. * * * The forty-two thousand five hundred dollar verdict was so excessive as to shock the conscience of the court. * * *

"Now the right of the court to revise a jury verdict is a delicate one, and one this court is always slow to exercise, but justice requires that course in this case. We don't know, and it would be speculative to say, on what definite basis the jury arrived at such a verdict, but it was certainly not on the evidence the court heard during the trial. * * * At any rate, it was so excessive as to evince passion, prejudice and caprice on the jury's part, and the court's duty in the matter is very plain" (App. 102a-103a).

"The court regrets the necessity of saying so, but under the evidence, that is, the substantial evidence in the case, it is the court's view that this verdict should be reduced to twenty-five thousand dollars. After this reduction, it is still a very large verdict" (App. 104a).

TRIAL JUDGE HAS DISCRETIONARY POWER TO ORDER A NEW TRIAL.

The Court of Appeals, in reversing the case, recognized the established rule that the trial judge has the discretionary power to order a new trial, but held that it was error to reduce the verdict "without giving appellant an opportunity of either accepting a remittitur or of having a new trial. **Kennon v. Gilmer**, 131 U. S. 22, 27-30; **Dimick v. Schiedt**, 293 U. S. 474, 482-485."

It also held that upon remand the district court would have the power either to grant a new trial generally or of denying a new trial on condition that appellant accept

a judgment for a lesser amount than the jury's verdict. On this point, we quote from the decision of this Court in **Kennon v. Gilmer**, 132 U. S. 22, which, after stating that it had no authority to pass upon any question of fact involved in the consideration of the motion for a new trial, held as follows:

> "The erroneous judgment of the Supreme Court of the Territory being reversed, the case will stand as if no such judgment had been entered; and that Court will be at liberty, in disposing of the motion for a new trial, according to its view of the evidence either to deny or to grant a new trial generally, or to order judgment for a less sum than the amount of the verdict, conditional upon a remittitur by the plaintiff."

Under Rule 59 of the Federal Rules of Civil Procedure the trial judge is authorized to grant a new trial for any of the reasons for which new trials had theretofore been granted in actions at law, and for any of the reasons for which new hearings had theretofore been granted in suits in equity in the courts of the United States.

Under Rule 59 (d), the Court, of its own initiative, may order a new trial for any reason for which it might have granted a new trial on motion of a party, and the order shall specify the grounds therefor (Barron & Holtzoff, Federal Practice & Procedure, Sec. 1302).

In fact, it is not only the power but the duty of the judge who is not satisfied with the verdict of a jury, to set the verdict aside and grant a new trial. **Aetna Casualty & Surety Co. v. Yeatts**, 4th Circuit, 122 F. 2d 350.

It is well settled that the granting or refusing of a new trial is a matter resting in the sound discretion of the trial judge, and that his action thereon is not reviewable upon appeal save in the most exceptional circumstances. **Montgomery Ward & Company v. Duncan**, 311 U. S. 243; **Fairmont Glassworks v. Cub Four Coal Co.**, 287 U. S. 474.

Had the trial judge set aside the judgment and granted a new trial, his action in so doing would not have been reviewable under the facts in this case, but he reduced the verdict instead of granting a new trial, conditional upon a remittitur by the plaintiff.

It is clear of doubt that the respondent was entitled to a new trial, which petitioner could have avoided by treating the reduction made by the judge as a remittitur. Failing to do that, he had no right to complain of the action of the Court of Appeals in remanding the case.

No ground for certiorari is set forth in the petition. The lengthy petition (45 pages in length) fails to state a single reason why the writ of certiorari should be granted.

Its argument (pages 9-26) would be more appropriate before a jury than the Supreme Court; moreover, it directly challenges the well-established remittitur practice in Federal Courts (pages 21-22 of the Petition).

The Petition for Certiorari does not point out any conflict in decisions of the different circuits or any violation of an applicable decision of this court, nor does it present with accuracy, brevity and clearness whatever is essential to a ready and adequate understanding of the points requiring consideration as required by Rule 23 of this Court.

It is, therefore, respectfully submitted that the Petition should be denied.

L. E. GWINN,
725 Columbian Mutual Tower,
Memphis, Tennessee,
Attorney for Respondent.

NELSON, NORVELL and FLOYD,
1001 Columbian Mutual Tower,
Memphis Tennessee,
(Of Counsel).